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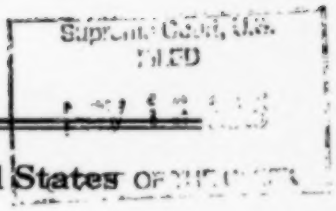

In the Supreme Court of the United States

STEPHEN DUNCAN, Warden,

PETITIONER,

v.

LAWRENCE OWENS,

RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Section 2254(d)(1) of Title 28 of the United States Code requires that any claim adjudicated on the merits in state court be contrary to, or an unreasonable application of, clearly established Supreme Court precedent before habeas relief may be granted. In this case, Respondent was convicted of murder at a bench trial, and in announcing the verdict, the trial judge made an inference concerning Respondent's motive, which was not an element of the crime. Respondent claimed that the judge made improper "extrajudicial" findings regarding his motive and thus found him guilty based on evidence not produced at trial. The state appellate court upheld Respondent's conviction, holding that the trial court's inference regarding motive, if error, was harmless. The Seventh Circuit overturned Respondent's conviction on habeas corpus review, finding that the trial court's inference about motive violated Respondent's right to have his guilt adjudicated solely on the evidence introduced at trial, relying on Supreme Court decisions involving juries exposed to impermissible information or influences, and finding the error not harmless.

Did the Seventh Circuit violate 28 U.S.C. § 2254 and a long line of this Court's decisions by awarding habeas relief in the absence of clearly established precedent from this Court?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit granting habeas relief (App. 1a-10a) is reported at 781 F.3d 360. The memorandum opinions of the United States District Court for the Northern District of Illinois denying relief (App. 11a-55a (denying habeas relief on Respondent's ineffective assistance of counsel claim and declining to issue a certificate of appealability on all claims) & App. 56a-90a (denying habeas relief in part, including on the claim at issue here), are unpublished but are reported at 2014 WL 539125 and 2012 WL 1416432. The order of the Illinois Supreme Court denying leave to appeal on postconviction appeal (App. 91a) is reported at 955 N.E. 2d 477 (Table) (Ill. 2011). The unpublished opinion of the Illinois Appellate Court affirming Respondent's judgment of conviction on postconviction appeal (App. 92a-95a) is unreported. The order of the Illinois Supreme Court denying leave to appeal on direct appeal (App. 96a) is reported at 788 N.E. 2d 733 (Table) (Ill. 2003). The unpublished opinion of the Illinois Appellate Court affirming Respondent's judgment of conviction on direct appeal (App. 97a-129a) is unreported.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Seventh Circuit entered judgment in this case on March 23, 2015. App. 1a-10a. Petitioner timely filed a petition for certiorari with this Court on June 22, 2015, which this Court granted on October 1, 2015. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . deprive any person of life, liberty, or property, without due process of law."

Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1).

STATEMENT

On the evening of September 22, 1999, in Markham, Illinois, Respondent Lawrence Owens attacked Ramon Nelson and beat him with a baseball bat (or something similar). App. 98a. Nelson died from his injuries the next day. *Ibid.*, JA13. Respondent was convicted of the murder at a bench trial in the Circuit Court of Cook County, Illinois, on November 8, 2000. App. 97a.

The Evidence and Trial

At trial, both the prosecution and the defense emphasized that the main issue in the case was the identification of Nelson's killer. *E.g.*, JA110 (State's closing argument); JA116 (defense closing argument). The State presented two eyewitnesses: Maurice Johnnie and William Evans. Although there were some inconsistencies in their testimony, App. 119a, they independently identified Respondent as the assailant in photo-arrays at the police station on September 28, 1999, JA63, JA68-69, which was less than a week after the murder; line-ups at the police station a month after the photo-array, JA65, JA68-69; and in court, JA26, JA81. As the Illinois Appellate Court noted, "[t]here is no evidence that Johnnie and Evans knew each other or had any reason to conspire and fabricate their testimony." App. 120a.

Trial Testimony about the Attack

Both Johnnie and Evans testified that they saw Respondent attack Nelson. JA26, JA83. They both stated that they saw Respondent's face, and they both reiterated that the area was well-lit. JA18-19, JA31-32, JA42-44, JA51-52, JA80.

Maurice Johnnie's testimony

Johnnie testified that sometime after 8:00 p.m. on September 22, 1999, he was in the front passenger seat of his own car, parked ten feet from the entrance to Mackie's Lounge, which was also a liquor store. JA17, JA18. Johnnie's friend Johnny Morgan was in the driver's seat, and they were waiting for a friend of Morgan's who had gone into the store. JA17, JA19.

Nelson, who was on a bicycle, pulled up alongside the driver-side door and began speaking with Morgan. JA20. They spoke for three to five minutes, after which Nelson rode his bike past the front of the car, onto the sidewalk, and towards the entrance to Mackie's. JA20-21.

When Nelson was about eight feet from the entrance of the liquor store, Johnnie saw a man he later identified as Respondent walking down the sidewalk toward Nelson. JA22. As Nelson tried to turn around, Respondent caught up with him and hit him on the head with a wooden stick or baseball bat. JA23. Johnnie saw Respondent hit Nelson twice. JA24. After the first blow, Nelson, who was still on his bike, fell backwards into the doorway of the liquor store. *Ibid.* As Nelson lay on the ground, Respondent hit him on the head with the bat a second time and then left in the direction he had come from. *Ibid.* From a distance of about eight feet, Johnnie had a clear look at Respondent's face as he walked away. JA52. Although the sun had gone down, it was not completely dark and the area was well-lit. JA18-19.

William Evans's testimony

Around 8:00 p.m. on September 22, 1999, Evans was on the northeast corner of the block on which

Mackie's is located, when he saw Nelson, whom he knew, riding a small bicycle. JA76-78. Like Johnnie, Evans testified that it was not yet fully dark and there were lights coming from the liquor store. JA80. After Evans and Nelson spoke for thirty minutes, Nelson rode off toward the lounge's front entrance, where he stopped and sat on his bike near the liquor store doors. JA79.

Evans saw Respondent and another man walk up to Nelson and start talking to him. JA80-81. Evans did not know them by name, but he saw their faces and recognized both men from having seen them previously around Mackie's. JA80. Respondent was carrying a baseball bat. JA81.

Evans kept a bucket with cleaning materials nearby, which he used to wash cars. JA79, JA82. He was retrieving his bucket when he heard something that sounded like wood splitting. JA79, JA82. Evans looked back and saw Respondent hit Nelson with the bat twice on the head as Nelson lay on the ground near the entrance to the liquor store. JA83-84. After Evans yelled, "Hey, what is going on," Respondent and the second person fled. JA84.

The Identifications

Johnnie and Evans each independently identified Respondent as Nelson's killer on three different occasions: in a photo-array a week after the attack, in a line-up a month after that, and at trial. JA26, JA63, JA65, JA68-69, JA81.

On September 28, 1999, Johnnie went to the Markham police station and gave the police a description of Nelson's assailant. JA37. Detective Terry White, who had been assigned to investigate Nelson's

murder, assembled a photo-array of six pictures. JA58-59, JA63. Johnnie identified a picture of Respondent as Nelson's attacker. JA63. Evans likewise identified Respondent as the killer from a photo-array on September 28, 1999. JA68-69.

On October 27, 1999, Johnnie and Evans independently picked Respondent out of a line-up at the Markham police station. JA65, JA68-69. Respondent was the only person who appeared in both the photo-array and in the line-up. JA45, JA71.

At trial, both Johnnie and Evans identified Respondent as Nelson's attacker. JA26, JA81. Evans was asked to identify the photograph he had picked out of the photo-array. JA86. He pointed to a picture of someone other than Respondent. *Ibid.* (identifying photo #2; the picture of Respondent was photo #4, JA63). But when shown a photograph of the line-up he had viewed at the police station, Evans pointed to Respondent as the man he had identified. JA87. Johnnie likewise identified Respondent as the person he had selected when he was shown a picture of the line-up. JA35.

The Investigation and Arrest

After Johnnie and Evans identified Respondent from the photo-array on September 28, 1999, Detective White informed other police officers that Respondent, also known as Big O, was wanted in connection with a murder investigation. App.100a. One of those officers was Officer Mike Alexander.[1] *Ibid.*

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[1] Officer Alexander testified at a pretrial hearing on Respondent's motion to quash his arrest. App. 98a, 100a-101a. That motion was denied, App. 101a, and is not at

On October 26, 1999, Officer Alexander was in an unmarked squad car when he saw a blue Mercury Topaz speed by, traveling 50 miles an hour in a 20 mile-an-hour zone. *Ibid.* Alexander turned on his lights and sirens, but the Topaz did not stop. *Ibid.* Instead, it sped up and ran a stop sign. *Ibid.* Eventually the Topaz pulled over, and Respondent jumped out and started running. *Ibid.* Alexander chased after him on foot and caught him when they both ran out of breath approximately a block and a half later. *Ibid.* Alexander arrested Respondent for speeding and for driving without a license and took him to the Markham police station. *Ibid.* Alexander told Detective White that Respondent was in custody. App. 101a. Detective White then arranged the line-ups that Johnnie and Evans witnessed. JA64-65, JA68.

Additional Stipulations and Witness Examination

The parties stipulated that when he was attacked, Nelson, who was seventeen years old, JA11, had forty small plastic bags of crack cocaine in his coat pocket. JA107, App. 109a, 118a.

Both the prosecution and the defense brought out the fact that Evans was receiving favorable sentencing recommendations from the State on two drug-related matters in exchange for testifying truthfully. JA76, JA96-99. Specifically, Evans was facing a charge of possession of a controlled substance with intent to deliver that threatened to violate his probation for an earlier conviction for delivery of a controlled substance.

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issue here. At trial, the parties stipulated that if called to testify, Officer Alexander would testify as he had at the pretrial hearing. JA56.

JA75. In exchange for his truthful testimony, the State agreed to recommend continued probation for both offenses. JA76. On redirect examination, the prosecution showed that Evans's trial testimony was consistent with his grand jury testimony, which occurred before the arrest giving rise to his current legal troubles. JA102-104.

The End of the Trial and the Verdict

The defense rested without presenting evidence. JA110. During closing arguments, both the prosecution and the defense emphasized that the key issue in the case was the identity of the killer. JA110, JA116. The defense attempted to cast doubt on Johnnie's and Evans's identifications of Respondent in part by pointing to a mole on Respondent's face. JA121-122, JA127 Since they both had clear, well-lit views of the killer's face, the defense argued, if Respondent had in fact been the killer, Johnnie and Evans would have described the killer as having the mole, and they did not. JA121-122, JA127. Neither the prosecution nor the defense discussed motive during the closing arguments. JA110-133.

After the closing arguments, the trial court stated:

> I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who Larry Owens knew he was a drug dealer. Larry Owens wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder.

JA133. The court sentenced Respondent to twenty-five years of imprisonment. App. 110a.

Direct Appeal

On direct appeal, Respondent argued, *inter alia*, that the trial court made improper "extrajudicial" findings regarding his motive and based its finding of guilt on evidence not produced at trial. R1638-1640. The Illinois Appellate Court affirmed Respondent's conviction. App. 127a. It noted the presumption that in a bench trial "the trial judge considered only competent evidence in reaching his verdict." App. 118a (citing *People v. Worlds*, 400 N.E.2d 85 (Ill. App. 1980)). The appellate court did not rest on that presumption alone, however; it considered the evidence that was before the trial court, acknowledged the discrepancies between Johnnie's and Evans's testimony, and noted the weaknesses in Evans's credibility. App. 119a. The court also considered the reliability of Johnnie's identification of Respondent and concluded that, in light of his opportunity to view Respondent during the attack, his high degree of attention to the attacker, the consistency of his description with Evans's, his certainty about his identification, and the timeframe between the incident and the photo-array and line-up, his testimony was reliable. App. 120a-122a; see also App. 117a (discussing factors this Court identified in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), for evaluating reliability of eyewitness testimony).

In sum, the appellate court held that "despite the contradictions between their testimony, both Johnnie and Evans put defendant at the scene of the crime and both identify defendant as Nelson's assailant. There is no evidence that Johnnie and Evans knew each other or had any reason to conspire or fabricate their testimony." App. 120a. It concluded that, "in light of these identifications, the trial court's speculation as to

defendant's motive for assaulting Nelson, will be construed as harmless error." *Ibid.* One justice dissented, App. 127a-129a, finding the presumption that judges follow the law rebutted, App. 128a, and arguing that the trial judge's "unsupported insinuations" were not harmless because the eyewitness identification "was marginal" and the judge showed no indication he was aware of this "impropriety," App. 129a.

Respondent's discretionary petition for leave to appeal to the Illinois Supreme Court claimed that the trial judge made improper "extrajudicial" findings regarding Respondent's motive, abandoning the other claims presented on direct appeal. R1775-1793. On April 2, 2003, the Illinois Supreme Court denied Respondent's petition for leave to appeal. App. 96a.

State Postconviction Petition

Next, Respondent filed a pro se postconviction petition in the Illinois trial court, R3, and counsel filed supplemental petitions, R1798-1827, R1886-1893. These petitions raised claims not at issue here. R1798-1799. The state trial court dismissed all of Respondent's claims. R1911.

Respondent appealed the denial of his postconviction petition, and the Illinois Appellate Court affirmed. App. 94a. Respondent filed a petition for leave to appeal, R429-440, which the Illinois Supreme Court denied, App. 91a.

Federal Habeas Petition

While his postconviction appeal was pending, Respondent filed the habeas petition underlying this proceeding, arguing, *inter alia*, that the trial court

made improper "extrajudicial" findings regarding Respondent's motive and based its finding of guilt on evidence not produced at trial. R7 The district court held that Respondent had failed to identify "any Supreme Court precedent that the Appellate Court allegedly applied in an unreasonable or contrary way," App. 76a, as required for habeas relief under § 2254(d) of AEDPA, 28 U.S.C. § 2254(d). The district court also held that even if Respondent could identify any Supreme Court precedent violated by the trial court's inference as to motive, the appellate court's harmless error finding was a reasonable application of *Chapman v. California*, 386 U.S. 18 (1967). App. 76a-77a. The district court denied habeas relief on this and all other grounds raised in the habeas petition and declined to issue a certificate of appealability on any ground. App. 11a-55a.

Subsequently, the Seventh Circuit granted a certificate of appealability solely on the question of whether Respondent's due process rights were violated because the trial judge relied on "extra-record facts" in determining Respondent's guilt. Cir. Doc. 11. On March 23, 2015, the appellate panel issued its opinion granting Respondent habeas relief under 28 U.S.C. § 2254. App. 1a-10a.

In that decision, the Seventh Circuit opined that there are substantial doubts about the reliability of eyewitness evidence generally, although it acknowledged that the eyewitness identifications in this case "could * * * have supported a finding beyond a reasonable doubt that Respondent had murdered Nelson." App. 4a. But the Seventh Circuit felt that "it is highly uncertain" whether the trial court found that evidence was sufficient because that court's only

explanation of its verdict focused on the motive for the murder, leading the Seventh Circuit to conclude that the trial judge "appears to have been thoroughly confused." App. 8a. Had the evidence been "overwhelming," the Seventh Circuit continued, the trial judge's comments regarding motive "could be disregarded as goofy but harmless," but here "the entire case pivoted on two shaky eyewitness identifications." *Ibid.*

The Seventh Circuit was "mindful that only clearly established violations of a defendant's constitutional rights permit [the court] to reverse a state court decision challenged in a federal habeas corpus proceeding." App. 9a-10a. Citing cases from this Court in which a jury was exposed to information or influences other than properly introduced evidence of defendant's guilt, as well as two circuit precedents, the Seventh Circuit concluded that the state trial judge's inference as to Respondent's motive violated Respondent's due process "right to have [his] guilt or innocence adjudicated on the basis of evidence introduced at trial." App. 10a. It also held that the error was not harmless under the standard articulated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), because the trial judge's declaration that motive was the "real issue" "had to have had" a "malign influence" on the verdict. App. 9a. The Seventh Circuit then granted habeas relief. App. 10a.

This Court granted certiorari on October 1, 2015.

SUMMARY OF ARGUMENT

Relief under § 2254 of AEDPA was not proper because the Illinois Appellate Court's adjudication of Respondent's claim was not contrary to, or an unreasonable application of, clearly established law as determined by this Court. More specifically, this Court has never held that a trial judge's inferences regarding motive, which is not an element of the crime of murder, is a violation of a criminal defendant's right to due process, even if those inferences are not directly established by the trial evidence. Nor did the Seventh Circuit point to any such clearly established precedent from this Court when it granted habeas relief under § 2254. Instead, the Seventh Circuit violated this Court's unmistakable admonition against framing the issue at too high a level of generality when determining whether there is clearly established law, and it relied on authority that did not address Respondent's claims. For this basic reason, AEDPA's highly deferential standard was not satisfied and the grant of habeas relief was not justified.

Additionally, the trial court's inference about Respondent's motive for murdering Nelson, even if unsupported, was harmless. There was ample evidence before the court, including eyewitness identifications and Respondent's flight from police, that Respondent committed the murder. In light of that evidence, the judge's inference about motive does not cast grave doubt on the verdict. Moreover, in reaching the result below, the Seventh Circuit misapplied the AEDPA standards and contradicted the state court's explicit finding that there was reliable eyewitness testimony supporting Respondent's guilt. For these reasons, the Seventh Circuit's decision should be reversed, and

Respondent's claim does not warrant federal habeas relief.

ARGUMENT

I. The Seventh Circuit Granted Habeas Relief In Violation Of § 2254(d) of AEDPA.

The "starting point" in considering a petition for habeas corpus "is to identify the 'clearly established Federal law, as determined by the Supreme Court of the United States' that governs the habeas petitioner's claims." *Marshall v. Rodgers*, 133 S. Ct. 1446, 1449 (2013) (per curiam) (citing *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). AEDPA makes this requirement explicit. 28 U.S.C. § 2254(d)(1). If no such precedent exists, then in a case like this one, where the state courts considered the claim on the merits, no habeas relief is available. *Rodgers*, 133 S. Ct. at 1449.

This requirement serves the "important interests of federalism and comity," under which "federal judges are required to afford state courts due respect by overturning their decisions only when there can be no reasonable dispute that they were wrong." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam). As this Court has emphasized, federal habeas review of state convictions is "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011).

AEDPA puts this principle into practice by restricting habeas relief to narrowly defined circumstances. Where, as here, a state court has already considered and rejected a claim on the merits, a federal court must first determine, based solely on

the record before the state court, whether that court's rejection of the claim was contrary to, or an unreasonable application of, United States Supreme Court precedent. *Cullen v. Pinholster*, 563 U.S. 170, ___, 131 S. Ct. 1388, 1400 (2011); *Rodgers*, 133 S. Ct. at 1449; see 28 U.S.C. § 2254(d)(1); see also, *e.g.*, *Donald*, 135 S. Ct. at 1378 (reversing grant of habeas due to no clearly established precedent); *Glebe v. Frost*, 135 S. Ct. 429, 430-32 (2014) (per curiam) (same); *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam) (same); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (same); *Wright v. Van Patten*, 552 U.S. 120, 124-26 (2008) (per curiam) (same). As this Court has recently reiterated, this standard is "highly deferential." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015). And "where the precise contours of a right remain unclear, state courts enjoy broad discretion in their adjudication of" a habeas petitioner's claims. *White v. Woodall*, 134 S. Ct. 1697, 1705 (2014) (internal quotation marks and citations omitted).

The Seventh Circuit failed to follow this requirement. Because no precedent of this Court holds that a finder of fact violates a defendant's due process rights when it infers a motive (especially where motive is not an element of the crime), Respondent is not entitled to habeas relief, and this Court should reverse the judgment of the Seventh Circuit.

A. No clearly established precedent of this Court holds that the trier's inference regarding motive, which is not an element of murder, violates a defendant's due process rights.

The Seventh Circuit failed to heed AEDPA's commands. Respondent claims that his due process

rights were violated when the trial judge relied on "extrajudicial" information to find him guilty. But no precedent of this Court clearly establishes that a defendant's constitutional rights are violated when the trier of fact draws an inference regarding a fact that is not an element of the crime. And it is undisputed that motive is not an element of the crime of murder in Illinois. See 720 ILCS 5/9-1(a) (1998)[2] (defining first degree murder in Illinois); *People v. Hobbs*, 220 N.E.2d 469, 472 (Ill. 1966) (holding that motive is not an element of murder).

The cases on which the Seventh Circuit relied do not address Respondent's claim and thus cannot support relief under AEDPA. See *Donald*, 135 S. Ct. at 1377 ("Because none of our cases confront the specific question presented by this case, the state court's decision could not be contrary to any holding from this Court.") (internal quotation marks and citations omitted). More specifically, all of the cases from this

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[2] In 1999, section 5/9-1 of the Illinois Criminal Code defined first degree murder, in relevant part, as follows:

(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another * * *

720 ILCS 5/9-1(a) (1998); see also 720 ILCS 5/9-1(a) (2000) (same statutory text).

Court that the Seventh Circuit discussed, see App. 2a, 10a,—*Taylor v. Kentucky*, 436 U.S. 478 (1978), *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986)—involved juries that were exposed to prejudicial and improper information or influences from which guilt could be inferred. None of them supports relief under § 2254(d).

In *Taylor*, for example, this Court held that the right to a fair trial was violated where the prosecution invited the jury to infer defendant's guilt from the fact that he had been arrested and indicted and where the court provided inadequate instructions regarding the State's burden of proof. 436 U.S. at 485-88. But *Taylor* addressed a different question from that at issue here. First, unlike the defendant in *Taylor*, Respondent here had a bench trial, not a jury trial, and judges are presumed to know and follow the law and to be less susceptible to considering improperly admitted evidence than are juries. See *Williams v. Illinois*, 132 S. Ct. 2221, 2235 (2012) (noting presumption under both Illinois and federal law) (citing *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (per curiam)). Second, the State in this case did not invite the trial judge to infer Respondent's guilt from any improper basis, as the prosecution did in *Taylor*.

The Seventh Circuit's reliance on *Estelle v. Williams*, 425 U.S. 501, is similarly misplaced. *Estelle* held that the right to a fair trial was violated where the defendant was compelled to appear before the jury in prison attire, but found no violation occurred where the defendant failed to object. 425 U.S. at 512. But, again, Respondent has never argued that any similarly prejudicial factor influenced the verdict at his bench trial.

The final case on which the Seventh Circuit relied, *Holbrook v. Flynn*, 475 U.S. 560, is even further afield. There, this Court held that the right to a fair trial was *not* violated by the presence of additional, uniformed security personnel in the courtroom. 475 U.S. at 572. *Flynn* thus offers no support for Respondent's claim.

The Seventh Circuit claimed that these cases meet AEDPA's "exacting standard" and described them as holding that "a judge or a jury may not convict a person on the basis of a belief that has no evidentiary basis whatsoever." App. 10a. But this description of the cases fails to heed this Court's repeated warning that the lower courts should not "frame[] the issue at too high a level of generality" in discussing whether a principle is clearly established enough to support habeas relief. *Donald*, 135 S. Ct. at 1377; see also *Smith*, 135 S. Ct. at 4 ("caution[ing] the lower courts against 'framing our precedents at such a high level of generality' ") (quoting *Nevada v. Jackson*, 133 S. Ct.1990, 1994 (2013) (per curiam)). Likewise, this Court has emphasized that only its holdings, not dicta, are relevant for purposes of determining what is clearly established. *Williams v. Taylor*, 529 U.S. at 412.

Not only has this Court repeatedly warned against such generalizations and inferences, but it has specifically rejected an attempt to generalize from the holdings of *Estelle* and *Flynn* themselves—the very cases relied on by the Seventh Circuit—in factual circumstances much closer to them than the circumstances presented here. In *Musladin*, the habeas petitioner argued that his right to a fair trial was violated when members of the victim's family sat in the front row of the gallery during trial wearing buttons

with the victim's picture on it. 549 U.S. at 72. The state court denied this claim. *Id.* at 73. The Ninth Circuit subsequently granted habeas relief, holding that the state court's opinion was contrary to the rule of federal law clearly established by *Estelle* and *Flynn*. *Ibid.*

This Court reversed, holding that *Estelle* and *Flynn* addressed only "the effect of state-sponsored courtroom practices on defendants' fair-trial rights," *id.* at 75,—in *Estelle*, holding due process violated by forcing a defendant to appear before the jury in prison garb, 425 U.S. at 512, and in *Flynn*, denying relief where extra uniformed security personnel were in the courtroom, 475 U.S. at 572. As a result, this Court held that those cases did not clearly establish that similarly prejudicial *spectator* conduct could violate a defendant's right to a fair trial. *Musladin*, 549 U.S. at 75-76.

The distinction between Respondent's claim here and the rule established by *Estelle* and *Flynn* is even starker: those cases cannot be said to clearly establish any rule under which Respondent is entitled to relief because he does not argue that any such prejudicial factor influenced the verdict. Instead, Respondent is complaining about the trial judge's thought processes, even as he ignores the presumption that judges know and follow the law, see *Williams v. Illinois*, 132 S. Ct. at 2235; *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) That distinction precludes reliance on those cases as "clearly established" law "as determined by" this Court, as AEDPA requires.

Where, as here, this Court has never clearly held that Respondent's claim (or one very close to it) established a violation of his federal constitutional rights, the state court could not have unreasonably

applied clearly established Supreme Court precedent in denying him relief, see, *e.g.*, *Van Patten*, 552 U.S. at 125; *Musladin*, 549 U.S. at 77, and the Seventh Circuit erred in concluding otherwise.

B. The Seventh Circuit wrongly relied on its own precedent in determining what is clearly established law for purposes of AEDPA.

The Seventh Circuit also pointed to two of its own decisions, *United States v. Moore*, 572 F.3d 334, 341 (7th Cir. 2009), and *United States v. Garcia*, 439 F.3d 363, 366-68 (7th Cir. 2006), in support of its acceptance of Respondent's claim. App 2a, 10a. But circuit precedent cannot satisfy AEDPA's requirement of clearly established law. *Smith*, 135 S. Ct. at 1 ("We have emphasized, time and again, that [AEDPA] prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is 'clearly established.' ") (citing *Rodgers*, 133 S. Ct. at 1450-51); see also *Frost*, 135 S. Ct. at 430; *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) (per curiam). Nor may a court "canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Cicuits that it would, if presented to this Court, be accepted as correct." *Rodgers*, 133 S. Ct. at 1451. *Moore* and *Garcia* are thus irrelevant to the § 2254(d) analysis.

Even if reliance on Seventh Circuit precedent were appropriate, *Moore* and *Garcia* do not support, much less clearly establish, the legal merits of Respondent's claim. Like *Estelle*, *Flynn*, and *Taylor*, both *Moore* and *Garcia* involved juries, not judges, as triers of fact. And in *Moore*, while the court recited the general principle that "[g]uilt beyond a reasonable doubt cannot be

premised on pure conjecture," 572 F.3d at 341, it *upheld* a conviction in which the jury had to infer a variety of connections between different pieces of evidence and disregard other evidence to accept the government's theory of the case, *id.* at 337-41. Likewise, the *Garcia* court uncontroversially observed that the presumption of innocence means that a jury cannot be "encouraged (or allowed) to consider facts which have not been received in evidence." 439 F.3d at 367. But *Garcia* also upheld the conviction over the defendant's challenge to expert testimony that, he claimed, encouraged an inappropriate inference of his guilt. *Id.* at 368 (distinguishing *Taylor*, 436 U.S. at 484-90). Neither case supports Respondent's claim. In fact, they both rejected arguments that verdicts cannot be upheld where the trier of fact made inferences from the evidence before it. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (holding that it is finder of fact's responsibility to draw reasonable inferences from evidence).

C. The Seventh Circuit contorted the trial judge's statement and, in doing so, wrongly rejected the Illinois Appellate Court's reasonable findings of fact.

Perhaps recognizing the lack of clearly established Supreme Court precedent, the Seventh Circuit engaged in a labored (and ultimately unsuccessful) effort to conform Respondent's claim to existing precedent, in part by mischaracterizing the state trial judge's remarks. The Seventh Circuit wrongly concluded that the trial judge found the State's evidence insufficient to convict and that the verdict was based solely, or at least primarily, on the judge's inference that

Respondent knew that the victim was a drug dealer. App. 8a-9a. But the judge explicitly referred to "the State's evidence" in rendering his verdict. App. 4a-5a. That the trial judge also inferred from the State's evidence a motive, which is not an element of the crime, while noting that the witnesses had all "skirted" that issue, does not negate the fact that he relied on "the State's evidence" to convict Respondent. *Ibid.*

In light of that evidence, the Seventh Circuit's suggestion that the trial court found Respondent guilty based solely or primarily on a ground not supported by the record, App. 6a-7a, is implausible. The trial judge was presented with not one, but two, eyewitnesses who had repeatedly identified Respondent as Nelson's killer both before and during the trial, as well as Respondent's own desperate flight from police when Officer Alexander attempted to pull him over for a traffic violation. With this evidence before it, the trial court inferred the motive to explain *why* Respondent committed the murder. But he would have had no reason to do so if the evidence had not convinced him that Respondent in fact committed the crime.

Moreover, a conclusion that the trial judge invented the motive as the primary reason for finding defendant guilty would fly in the face of the Illinois Appellate Court's reading of the very same record. In reviewing the judge's remarks, it relied on the presumption "that the trial judge considered *only* competent evidence in reaching his verdict." App. 118a (citing *Worlds*, 400 N.E.2d at 87) (emphasis added). This presumption is even more appropriate for a federal court reviewing a state trial judge's actions on habeas. See *Visciotti*, 537 U.S. at 24 (noting "presumption that state courts know and follow the

law" and "§ 2254(d)'s highly deferential standard for evaluating state-court rulings, * * * which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted). And the Illinois Appellate Court concluded that the competent evidence before the judge supported the verdict. App. 119a-122a.

To be sure, the finder of fact must find all *elements* of a crime proven beyond a reasonable doubt based on the evidence introduced at trial. See, *e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970). But the Seventh Circuit did not rely on *Winship* or any other precedent in that line of cases. Nor has Respondent argued in his habeas proceedings that the evidence was insufficient with respect to any element of his crime of murder. Here, there was evidence of every element—that Respondent killed Nelson, that he intended to kill him or do great bodily harm, and that he knew that his acts would cause, or had a strong probability of causing, death or great bodily harm. 720 ILCS 5/9-1(a) (1998); see *supra*, 16 n.2. Thus, even if, as the Seventh Circuit found, App. 4a-5a, the facts as stated by the trial court—that Respondent knew the victim was a drug dealer and, as the Seventh Circuit put it, that Respondent wanted to kill him for that reason—were "nonsense," App. 5a, because they are not necessary to establish the elements of first degree murder, Respondent cannot prevail.

Any argument about the sufficiency of the evidence, moreover, is forfeited because Respondent failed to argue it in any federal court. See, *e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (finding arguments not raised below forfeited); *Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (deeming waived

nonjurisdictional argument not raised in federal appeals court or in brief in opposition to this Court); see also Supreme Court Rule 15.2.

II. The State Appellate Court's Harmless Error Holding Must Be Upheld.

Even were this Court to find that the Illinois Appellate Court's holding conflicted with, or was an unreasonable application of, this Court's precedent, Respondent still would not be entitled to relief because any error was harmless. In the "absence of the rare type of error that requires automatic reversal," *Ayala*, 135 S. Ct. at 2197, habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice,'" *Brecht*, 507 U.S. at 637 (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)). "There must be more than a 'reasonable possibility' that the error was harmful." *Ayala*, 135 S. Ct. at 2198 (quoting *Brecht*, 507 U.S. at 637). Instead, relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). In contrast, the Seventh Circuit was prepared to hold any error harmless only if it found the evidence of defendant's guilt "overwhelming." App. 8a.

Moreover, where the state court has made a harmlessness determination, that harmlessness determination itself must be "unreasonable" for habeas relief to issue, and the deterimination "is not unreasonable if 'fairminded jurists could disagree on its correctness.'" *Ayala*, 135 S. Ct. at 2199 (quoting *Richter*, 562 U.S. at 101). A habeas petitioner thus "must show that the state court's decision to reject his

claim 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Richter*, 562 U.S. at 103).

The Illinois Appellate Court made a determination of harmlessness. App. 120a. Because this decision "undoubtedly" constitutes an adjudication on the merits, see *Ayala*, 135 S. Ct. at 2199, the highly deferential AEDPA standard applies, and the state court's determination cannot be overturned unless it is contrary to, or an unreasonable application of, *Chapman*, 386 U.S. 18. Here, the state court's determination should be upheld because it was not so lacking in justification that it was beyond the possibility for any fairminded disagreement. See *Ayala*, 135 S. Ct. at 2199.

To start, the Illinois Appellate Court's finding of harmless was not unreasonable because the evidence against Respondent was substantial. Both Johnnie and Evans identified Respondent as Nelson's killer not once, but three times each. And the Illinois Appellate Court, while acknowledging weaknesses and inconsistencies in Evans' testimony, carefully analyzed Johnnie's testimony with respect to the factors that this Court has held are indicia of an eyewitness's reliability. App. 117a, 119a-122a (citing and applying *Biggers*, 409 U.S. at 199-200). The state court explicitly found that Johnnie's identification was reliable. App. 120a.

In particular, the Illinois Appellate Court noted that Johnnie testified that the murder occurred just eight feet away from where he sat in the passenger seat of his vehicle, that the area was well lit, and that he saw Respondent's face immediately before and after

the attack. App. 102a, 104a. Johnnie's description of the attacker was consistent with both Respondent's physical appearance and Evans's testimony regarding Respondent's appearance on the night of the murder. App. 103a-104a. Less than a week after the attack, Johnnie identified Respondent in a photo-array, and he subsequently identified Respondent both in a line-up and in court, each time expressing a high degree of certainty in his identification. App. 103a. In addition, Johnnie's testimony was largely corroborated by Evans, who testified that he saw Respondent beat Nelson with a baseball bat, App. 106a-107a, who said that he knew Respondent's face because he had previously seen him at the liquor store, App. 107a, and who, like Johnnie, identified Respondent as Nelson's killer on three separate occasions.

And these factual determinations by the Illinois Appellate Court are entitled to substantial deference under AEDPA. As § 2254(e)(1) specifies, "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Although the Illinois Appellate Court relied on these facts to conclude expressly that Johnnie's testimony was reliable, App. 121a, the Seventh Circuit improperly ignored that conclusion to find prejudicial error. Instead of presuming the Illinois Appellate Court's determination to be correct, as required by AEDPA, the Seventh Circuit improperly dismissed Johnnie, along with Evans, as a "shaky" witness. App. 9a. This refusal to credit the state court's conclusions alone warrants reversal of the Seventh Circuit's grant of habeas relief.

Additionally, the reasonableness of the Illinois Appellate Court's harmlessness determination is

demonstrated by other evidence supporting the trial judge's conclusion that Respondent was Nelson's killer. Specifically, Officer Alexander testified that Respondent attempted to flee, first by car and then on foot, when Alexander attempted to pull him over for speeding. App. 100a. See *People v. Lewis*, 651 N.E.2d 72, 93 (Ill. 1995) (flight can be evidence of consciousness of guilt); *Illinois v. Wardlow*, 528 U.S. 119, 136 (2000) (quoting *Hickory v. United States*, 160 U.S. 408, 419-20 (1896)) (same).

This strong evidence of Respondent's guilt, combined with the fact that the trial court's inference related to a non-element of the crime, establishes that the alleged error could not have had a substantial and injurious effect or influence on the verdict resulting in actual prejudice to Respondent. See *Brecht*, 507 U.S. at 637. It cannot be said that no "fairminded" jurist could agree with the Illinois Appellate Court's conclusion here. See *Ayala*, 135 S. Ct. at 2199 (citing *Richter*, 562 U.S. at 103). Any error was harmless, and Respondent is not entitled to habeas relief.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted.

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